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In The

Supreme Court of the United States

CITY OF HEALDSBURG,
Petitioner,

v.

NORTHERN CALIFORNIA RIVER WATCH,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Contrary to Respondent's contentions, this case is not just about local, fact-based issues. This case raises issues of national significance arising out of this Court's fragmented (4-4-1) decision in *Rapanos v. United States*, 126 S.Ct. 2208 (2006). The resolution of these issues implicates some of the most complicated and controversial aspects of Clean Water Act regulation in the country.

First and foremost is the question of how the lower courts should apply a fragmented decision of this Court that carried no majority behind a single rationale. The Courts of Appeal have already split on the interpretation of this Court's *Rapanos* decision, and recently one District Court went so far as to request reassignment when faced with the intractable conflict created by that decision and its progeny. *United States v. Robison*, 521 F.Supp.2d 1247, 1248 (N.D. Ala. Nov. 7, 2007). Even were the lone opinion of Justice Kennedy, concurring only in the decision to remand in *Rapanos* for further fact-finding, the law of the land, application of his "significant nexus" test to undisputed evidence showing no discernible effect on a navigable-in-fact waterway is still an open question ripe for consideration by this Court.

No less significant is the question of the deference that must be shown to expert administrative agencies, an issue of great significance to the *Rapanos* dissenters. Here, the Ninth Circuit gave no deference whatsoever to the Corp of Engineers, which had promulgated a national policy and ruled in Healdsburg's favor. Instead, without even

acknowledging the existence of the Corps' policy, the Ninth Circuit created a diametrically opposite rule that now governs in the Circuit and establishes precedent for the rest of the country. This case presents an opportunity not just to correct the rule manufactured by the Ninth Circuit, but to reinforce the importance of deferring to the expertise of the Executive Branch in complicated policy matters.

Also presented is the unresolved question of whether Congress intended the Clean Water Act to draw percolating groundwater, and the complex web of states' rights it implicates, into the federal regulatory fold. Labeling percolating groundwater as a "tributary" expands the scope of the Clean Water Act beyond Congress' clear intent. Similarly, blurring the distinction between "wetlands," meaning saturated soil supporting hydric vegetation, and "waterbodies," meaning open water, expands the Act beyond what even the agencies implementing the Clean Water Act intended.

Finally, but certainly no less important to many cities and towns across the country, is the question of what exactly is a "waste treatment system"? Both the Environmental Protection Agency and the Corps have regulations that say that "waste treatment systems" are not "waters of the United States." Until now, no one has suspected that a percolation pond, intended to perform the last step of treatment before releasing cleansed water to the environment, was itself a "water of the United States." Suddenly, with this one decision, every municipality using a percolation pond for treatment must now consider building new facilities just to discharge into their own, often

federally-funded, percolation ponds. The efficacy of the "waste treatment exception" needs to be restored.[1]

Nonetheless, Respondent argues that review by this Court is not warranted because this case, like virtually every case that comes before this Court, started as a little case of only local significance. Healdsburg respectfully submits that although it may be just a small city located in rural Northern California, the questions raised by this Petition are questions of great magnitude, the resolution of which will resonate for years in the jurisprudence of the Clean Water Act.[2]

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[1] Respondent suggests this matter is moot because Healdsburg has, under court order, now obtained an NPDES permit, but the matter is hardly moot to this small community faced with spending millions of dollars to build new treatment facilities just to comply with the requirements of that permit.

[2] The substantial national interest in this little, local case is further illustrated by the many *amici* that participated below, on both sides of the issues. Supporting Healdsburg were the National Association of Clean Water Agencies (formerly the American Municipal Sewerage Association), the California Association of Sanitation Agencies, the National Sand, Stone and Gravel Association, the American Forest & Paper Association, the Construction Materials Association of California and Syar Industries, Inc. Supporting Respondent were the National Wildlife Federation, San Francisco Baykeeper, Sierra Club, Oregon Natural Resources Council Action, Inc., and the California Planning and Conservation League. Even the United States Department of Justice, though not a party, weighed in before the Ninth Circuit.

I.

THIS CASE PRESENTS THE OPPORTUNITY TO RESOLVE WHETHER THE LONE OPINION IN A 4-4-1 DECISION CAN ESTABLISH A NATIONWIDE RULE OF LAW EVEN WHEN THE OTHER EIGHT JUSTICES EXPRESSLY DISAGREED WITH THE TEST ESPOUSED BY THE ONE JUSTICE

Justice Kennedy's solo concurring opinion in *Rapanos* espoused a "significant nexus" test of Federal Clean Water Act jurisdiction over "adjacent wetlands." *Rapanos*, 126 S.Ct. at 2248 (Kennedy, J., concurring). All eight of the remaining Justices expressly disagreed with Justice Kennedy's test. *See, e.g., id.* at 2233, 2235 (Scalia, J., joined by Roberts, C.J., Thomas & Alito, J.J., plurality) ("[Justice Kennedy's opinion] leaves the Act's 'text' and 'structure' virtually unaddressed, and rests its case upon an interpretation of the phrase 'significant nexus,' *ibid.*, which appears in one of our opinions") *and id.* at 2252, 2264 (Stevens, J., joined by Souter, Ginsburg & Breyer, dissenting) ("I do not share [Justice Kennedy's] view that we should replace regulatory standards that have been in place for over 30 years with a judicially crafted rule distilled from the term 'significant nexus' as used in *SWANCC*."). Indeed, as Chief Justice Roberts stated, "[i]t is unfortunate that *no* opinion commands a majority of the court on precisely how to read Congress' limits on the reach of the Clean Water Act." *Id.* at 2236 (Roberts, C.J., concurring) (emphasis added).

Nonetheless, the Ninth Circuit here wrote that in "a 4-4-1 decision, the controlling opinion is that of

Justice Kennedy." (Appendix A, p. 3a.) Other courts have disagreed with this interpretation of *Rapanos*, creating a split in the Circuits. *See, e.g., United States v. Robison*, 505 F.3d 1208, 1219 (11th Cir. Oct. 24, 2007) ("The circuits likewise are split on the question of which *Rapanos* opinion provides the holding.").

The confusion among the lower courts is graphically illustrated by a decision published since Healdsburg filed its Petition. Following the remand of *Robison*, *supra,* the District Court threw up its hands in frustration and asked for the case to be reassigned. The *Robison* District Court observed that "[n]o justice in *Rapanos*, including Justice Kennedy, stated that Justice Kennedy's opinion would be the absolute holding of the case." *Robison*, 521 F.Supp.2d at 1253. Faced with instructions from above that, "although eight justices did not accept Justice Kennedy's 'significant nexus' test, his opinion in that regard controls," *id.,* the District Court took the drastic step of requesting that it be removed from the case. *Id.* at 1248.

Even Respondent seems to disagree with the Ninth Circuit's endorsement of a "single Justice" standard. Seeking to construct a majority from the disparate views of the *Rapanos* court, Respondent postulates that, "an opinion that *would* be joined by a majority of justices" establishes the rule of law. Opp. at 13 (emphasis added). Of course, there was *no* majority rationale in *Rapanos* and Respondent's qualified endorsement of the "significant nexus" test is not the rule adopted by the Ninth Circuit. Rather, the Ninth Circuit has announced that the "significant nexus" test is the unbending rule of *Rapanos* because, in that

court's view, it "is the narrowest ground to which a majority of the Justices would assent if forced to choose in *almost* all cases." (Appendix A, p. 14a, 12a; emphasis added). This conclusion is all the more remarkable in light of Justice Kennedy's observation that, "neither the plurality nor the dissent addresses the nexus requirement." *Rapanos*, 126 S.Ct. at 2241 (Kennedy, J., concurring).

It may be simply that that there is no majority agreement in *Rapanos* and the efforts of the Circuit Courts to construct one are in error. In this circumstance, as Justice Souter has noted, the law remains in equipoise: "[It] is an unusual case, not because no single opinion enlisted a majority, but because no common ground united any five Justices. . . . [The Court] was in equipoise, leaving a decision in the same posture as an affirmance by an equally divided Court, entitled to no precedential value." *Nichols v. United States*, 511 U.S. 738, 749-750 (1994) (Souter, J., concurring in the judgment).

Clearly, the lower courts are struggling with the fragmented *Rapanos* opinions. The present case squarely presents an opportunity to clarify the law regarding Clean Water Act jurisdiction.

II.

THIS CASE PRESENTS THE OPPORTUNITY TO DETERMINE WHETHER JUSTICE KENNEDY'S "SIGNIFICANT NEXUS" TEST REQUIRES A SHOWING OF A WETLAND'S BENEFICIAL IMPACT ON THE WATER QUALITY OF A NAVIGABLE-IN-FACT WATERWAY

Justice Kennedy's "significant nexus" test requires a finding that the wetlands at issue must "significantly affect the chemical, physical, and biological integrity" of navigable-in-fact waters. Federal jurisdiction is absent when the "wetlands' effects on water quality are speculative or insubstantial." *Rapanos*, 126 S.Ct. at 2248 (Kennedy, J., concurring).

First, neither the District Court nor the Ninth Circuit found evidence of any discernible impact *on the navigable-in-fact waterway itself*. Instead, the only discernible "impact" was a measured elevation of "chloride" (i.e., salt) in the *underground aquifer* near the river. The undisputed evidence established that the relatively small amount of salt transmitted through the aquifer to the river was *indiscernible* in comparison to the naturally-occurring salt in the river. Under Justice Kennedy's analysis, any effect of the gravel pit on the water quality of the river could only be deemed "insubstantial."

Moreover, Justice Kennedy's significant nexus test specifically addressed only the special status of *wetlands* under the Clean Water Act. Contrary to Respondent's implication, neither the Ninth Circuit

nor the District Court found that the waste treatment pond's narrow band of perimeter *wetlands*, as distinct from the percolation pond itself, "significantly affect the chemical, physical, and biological integrity" of the Russian River. This case presents an opportunity to determine whether the special status granted to *wetlands* under the Clean Water Act also extends to *waterbodies*, despite thirty years of regulations and jurisprudence that has concluded otherwise.

III.

THIS CASE PRESENTS THE OPPORTUNITY TO ESTABLISH THAT THE LOWER COURTS CANNOT SIMPLY IGNORE A NATIONAL POLICY ESTABLISHED BY EXPERT AGENCIES IN THE EXECUTIVE BRANCH AND INSTEAD ANNOUNCE A DIAMETRICALLY OPPOSITE RULE WITHOUT EXPLAINING WHY THE AGENCY POLICY IS NOT ENTITLED TO DEFERENCE

Respondent, like the Ninth Circuit, completely ignores the Corps' policy on whether to extend jurisdiction to gravel mining pits undergoing reclamation. The Corps established its policy of declining jurisdiction over gravel pits undergoing reclamation to *promote* environmentally beneficial reclamation activities. 63 Fed. Reg. 36040, 36055 (July 1, 1998).[3] Rather than showing deference to the

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[3] Respondent's repeated characterization of the pond as "abandoned" (Opp. at 1, 3 & 17) plainly contradicts to the Corps'

Corps' expertise, and indeed without even discussing the Corps' policy, the Ninth Circuit's decision threatens to bring those laudable reclamation activities to a halt.

Instead, Respondent focuses solely on the *District Court's* disregard of the Corps' decision to decline jurisdiction over the gravel pit in question here. While Respondent seeks to disparage the integrity of the Corps' senior regional administrator, its District Engineer, by referencing some imprudent comments by a low-level staffer, Respondent, as did the Courts below, fails to acknowledge that the Corps' decision in this instance was on all fours with the Corps' national policy on reclaiming gravel pits. This case presents an opportunity to affirm the importance of showing due deference to established national policy *and* to applications of the national policy by the administrative agencies with the expertise to understand the national ramifications of their decisions.

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policy that a pond undergoing reclamation is not "abandoned." *See* Petition at 22-25 (discussing Corps' policy on "abandonment").

IV.

THIS CASE PRESENTS THE OPPORTUNITY TO AFFIRM THE NATIONAL IMPORTANCE OF THE DISTINCTIONS BETWEEN WETLANDS, WATERBODIES, AND UNDERGROUND AQUIFERS

When Congress enacted the Clean Water Act, it gave careful consideration to including percolating groundwater within its regulatory scope, but Congress ultimately decided against invading the varied and complex realm of states rights and groundwater. In addition, the two regulatory agencies responsible for implementing the Clean Water Act have drawn clear distinctions between "wetlands" and other surface waterbodies such as "rivers, streams, . . . and natural ponds."[4] The Ninth Circuit's opinion rides roughshod over these important distinctions between waterbodies, wetlands, and underground aquifers. The District Court determined that the gravel pit itself is a "water of the United States" because the gravel pit "and the subterranean groundwater that flows through it are '*tributaries*' of the Russian River." (Appendix B, p. 47a; emphasis added). The Ninth Circuit affirmed, reasoning that the "Pond and the River overlie the same unconfined aquifer and that the land separating the two is saturated below the water table" and so fall within the regulatory definition of *wetland* as "'areas

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[4] *See* 33 C.F.R § 328.3(a)-(c); 40 C.F.R. § 122.2, reproduced at pages 4-5 of the Petition. Noteworthy is the inclusion of *natural* ponds, and the absence of *man-made* ponds, from the regulatory scope.

that are inundated or saturated by surface or groundwater.'" (Appendix A, p. 8a; emphasis added.) As a result, discharges *into* the man-made gravel pit (rather than discharges *from* the pit into a navigable waterway) are subject to regulation under the Clean Water Act.

Glossing over the lower courts' equating a subterranean aquifer with the "navigable waters" regulated under the Clean Water Act, Respondent attempts to reframe the question decided below, advancing a new "conduit" theory of jurisdiction. Respondent claims that the Ninth Circuit "did not rule that ground waters were 'waters of the United States' but instead found that ground water acted as a conduit for discharges of pollutants from the pond to the Russian River." Opp. at 11. Further, ignoring the Ninth Circuit's skirting of the regulatory requirement that a wetland support vegetation, Respondent's opposition simply focuses on the matter of "adjacency." Opp. at 12. As did the Ninth Circuit, Respondent ignores the fact that the regulatory concept of "adjacent" applies only to "wetlands." While the Corps and EPA each have regulations for "adjacent wetlands," neither has ever promulgated a comparable "adjacent water body" regulation. *Cf. San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 704 (9th Cir. 2007) (holding that "adjacent" water bodies are not subject to Clean Water Act regulation "by reason of that adjacency").

The fact remains that no appellate court has ever before held that a percolating groundwater aquifer confers federal jurisdiction on otherwise isolated waterbodies that may feed that aquifer. The

Congressional record of the adoption of the Clean Water Act is clear that Congress did not intend to invade the complex realm of state regulation of groundwater. *See* Petition at 16-21 (discussing courts of appeal decisions concluding that Congress did not intend to extend Clean Water Act jurisdiction to groundwater). Whether the subterranean aquifer is characterized as a "tributary," a "wetland," or a "conduit," the Ninth Circuit's decision, for the first time, premises Clean Water Act jurisdiction over a *surface water body* on a *groundwater* connection to a navigable waterway. The Ninth Circuit's unprecedented expansion of Clean Water Act jurisdiction, which conflicts with decisions by three other Circuits and throws into disarray over thirty years of wetlands regulation, should be reviewed.

V.

THIS CASE PRESENTS THE OPPORTUNITY TO RESOLVE WHETHER THE REGULATORY EXCEPTION TO THE DEFINITION OF "WATERS OF THE UNITED STATES" FOR WASTE TREATMENT SYSTEMS MEANS WHAT IT SAYS

The final issue of national significance raised by the Petition is whether a percolation pond consisting of a manmade, "non-jurisdictional"[5] pit, dug in non-jurisdictional uplands, falls within the "waste

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[5] The District Court expressly found that the gravel pit was *not* a jurisdictional "water of the United States" at the time it was put to use as a percolation pond. (Appendix B, p. 53a.)

treatment system" exception to the definition of "waters of the United States." Both the Corps' and the EPA's regulations state, "Waste treatment systems . . . are not waters of the United States." 33 C.F.R § 328.3(a)(8); 40 C.F.R. § 122.2. Despite this simple declarative statement, the Ninth Circuit invented preconditions to applying the exception that threaten to completely swallow and nullify the exception. Respondent's half-hearted defense of the Ninth Circuit's illogic provides no clarification or justification for the ill-conceived interpretation. Opp. at 17-18.

First, the Ninth Circuit declared the exception only applies if the waste treatment facility *already has* an NPDES permit under the Clean Water Act. (Appendix A, p. 18a.) This novel precondition, unsupported by authority, has the effect of converting virtually all state-permitted waste treatment systems into regulated "waters of the United States." Under this nonsensical rule, absence of federal regulation is predicated on the presence of federal regulation. Second, the Ninth Circuit has decreed the exception only applies to a "self-contained body of water that has no connection to a water of the United States." (Appendix A, p. 17a.) This second precondition has the absurd effect of "exempting" from Clean Water Act jurisdiction ponds which are non-jurisdictional anyway. The Ninth Circuit's creation of these two preconditions to application of the "waste treatment system" exception is not supported by authority and renders the regulatory exception superfluous.

CONCLUSION

Respondent's opposition to this Petition for Writ of *Certiorari* fails to address the national significance of this Petition. The Petition raises difficult questions of applying fragmented Supreme Court opinions, the boundaries of Clean Water Act jurisdiction and deference to expert administrative agencies' regulations and findings. These issues are of considerable national importance and interest. Healdsburg respectfully urges this Court to grant its petition.

Dated: February, 2008

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